No. 8993

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

KANSAS CITY LIFE INSURANCE COMPANY,
a Corporation,

Appellant,

vs.

BERTHA E. BOWMAN,

Appellee.

Appeal From the District Court of the United States for the District of Idaho, Eastern Division

APPELLANT'S BRIEF

DAN B. SHIELDS,
F. M. BISTLINE,
Attorneys for Appellant.

No. 8993

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

KANSAS CITY LIFE INSURANCE COMPANY,
a Corporation,

Appellant,

vs.

BERTHA E. BOWMAN,

Appellee.

Appeal From the District Court of the United States for the District of Idaho, Eastern Division

---

APPELLANT'S BRIEF

DAN B. SHIELDS,
F. M. BISTLINE,
Attorneys for Appellant.

INDEX

STATUTES AND RULES

CASES CITED

Pag

CASES CITED—Cont'd

No. 8993

IN THE

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

KANSAS CITY LIFE INSURANCE COMPANY,
a Corporation,

Appellant,

vs.

BERTHA E. BOWMAN,

Appellee.

Appeal From the District Court of the United States for the District of Idaho, Eastern Division

---

APPELLANT'S BRIEF

JURISDICTIONAL FACTS

Bertha E. Bowman, a citizen of Idaho, filed her complaint in the District Court of the Fifth Judicial District of the State of Idaho in and for Bannock County, on October 25, 1937 (p. 1) against the Kansas City Life Insurance Company, a corporation existing under and by virtue of the laws of the State of Missouri, for the sum of $5,000.00. There being a diversity of citizenship and the amount involved being in excess of $3,000.00 (U. S. C. A. Title 28, Section 41 (1)) appellant removed the case to the Federal court for the District of Idaho, the order (p. 33) therefor having been made by the judge of said District Court on December 2, 1937, and filed in said Federal Court on December 2, 1937. (U. S. C. A. Title 28, Section 71.) After removal of the cause to Federal Court,

defendant filed its answer on the 25th of February, 193 (p. 35).

Judgment for plaintiff was entered March 26, 193 (p. 41). On April 20, 1938, defendant filed and serve upon plaintiff Motion for New Trial (p. 109) pursuan to Rule of the District Court as follows:

> "Rule 75. (Idaho District Court) Within Thirt days after the entry of judgment, the applican shall serve upon the adverse party and file wit the Clerk a petition for a new trial, stating th grounds upon which he relies, * * * * * ."

This motion for new trial was over-ruled on June 1 1938. (p. 110.) Under said rule 75, the time for appea was stayed until the disposition of said petition for ne trial, said rule being as follows:

> "A petition for a new trial served and filed unde this rule shall be deemed to be entertained by th Court, and shall suspend the operation of the judg ment, and of any process that may have been issue thereon, and of any writ of error that may hav been granted; and thereafter no writ of error sha be taken out, or any process issued upon said judg ment until the disposition of said petition for ne trial."

Appellant appealed and order allowing appeal wa filed August 31, 1938. (p. 118.)

STATEMENT OF THE CASE

John D. Bowman died February 16, 1937, by gunsho His life was insured by a policy with appellant by whic it agreed to pay his beneficiary (plaintiff and appellee $2,500 upon proof of death regardless of cause or $5,0

in case of accidental death as defined by a provision of the policy, the pertinent parts of which are:

> "The additional sum payable in event of the accidental death of the Insured shall be due if the Company shall receive due proof * * * that such death resulted directly and independently of all other causes from bodily injuries, effected solely through external, violent and accidental means * * * except that this double indemnity benefit shall not be payable if the insured's death shall result directly or indirectly, wholly or partly from suicide, whether sane or insane * * * * *." (p. 20.)

Appellee sued for $5,000. The Complaint alleges that the death of the insured resulted directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental means, to-wit, by the accidental discharge of a shot gun, which struck the person and body of the said John D. Bowman (p. 30).

Defendant's answer conceded that plaintiff is entitled to the face of the policy, and offers judgment for that amount. It denies that death resulted from bodily injury effected through accidental means and specifically alleges that the death of the insured resulted from suicide. (p. 35.)

The case came on for trial, and at the close of plaintiff's case defendant moved for nonsuit upon the ground that plaintiff had not established accidental death. This motion was denied (p. 38). At the close of all the evidence defendant moved for a directed verdict upon the ground that no cause of action was shown from the evidence, which was also denied (p. 105).

The jury gave plaintiff a verdict for $5,000 with interest and the court entered judgment in her favor for

that amount. Defendant moved for a new trial upon the ground that the evidence was insufficient to justify the verdict in that there was no evidence that the death of the Insured resulted directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental means, and that the court further erred in not granting plaintiff's motion for a directed verdict on said ground.

The only question involved is the sufficiency of the evidence, it being contended by appellant that there is no evidence in the record that insured's death resulted from bodily injuries effected through external, violent and accidental means alone. This question was raised by defendant's motions for non-suit, for directed verdict, and for new trial, all of which were denied and exceptions taken.

In order that this question may be properly presented, we deem it necessary at this point to set out succinctly the facts and circumstances surrounding the death of said Insured, same being:

On December 1, 1935, deceased, John D. Bowman, suffered a cerebral thrombosis, a clot on the brain which produces an action akin to paralysis (p. 81). As a result of this he was very ill and was confined to bed about six or seven weeks (p. 75). His right side was paralyzed. Improvement from that time continued until the time of his death, at which time his physical condition was, to outward appearances, about normal, with the exception of his speech and his right hand. He couldn't grasp objects as he did before his sickness, at times dropping articles, such as dishes when he was wiping them. Cold weather would cause his right hand to become numb. He had a rather pronounced speech impediment; articulation was difficult and he could speak but a few words at a time.

After he was able to be out of bed, he gradually resumed doing chores, such as herding the cows, supervising the irrigating, driving the hay derrick for about two hundred tons of hay, helping with the threshing, feeding the cows and horses, repairing the machinery and driving a car around the farm.

About one-thirty on the day of his death, February 16, 1937, he went to his son's home and got the shotgun (Exhibit 1). As he left the house with the gun, his daughter-in-law, Verna A. Bowman, followed him to the door, and as he opened the door the birds flew out of the tree and he said "birds." She also noticed that he talked to the children and tapped or touched them on the heads as he was leaving, and that he appeared cheerful and smiled all the time. He was next seen by his son Bertram N. Bowman taking the gun toward his own house. About two-thirty that same afternoon he was seen at the store in Blackfoot operated by Brigham Horrocks by said Brigham Horrocks. He took two shot gun shells without waiting to be served. He was familiar with the store, having previously worked there for about a month. When he showed Horrocks the two shells, Horrocks said to him: "You don't want them. Leave them here." and Bowman told him he was going to shoot "birds."

Bowman was next seen by Verna A. Bowman about 3:30 that same afternoon going toward the barn. About five minutes later she heard a shot from the direction of the barn. At that time she was in the process of changing straw in the chicken coop and went on about her work and later went into the house, whence she heard another shot fired about 20 minutes after the first one. It also came from the direction of the barn. At the time she noticed a lot of birds flying around.

Deceased was found in the hay loft of the barn back of the sugar factory at Blackfoot, Idaho, about 4:20 that same afternoon by John N. Barnard (p. 61), who in tracing the source of blood on the back of his horses went to the hay loft and found Mr. Bowman lying on his back in the southwest corner of the hay loft just under a window which had no glass in it. He did not examine the body at that time, but notified one of the Bowman boys, who in turn notified the sheriff and coroner. The Sheriff, Coroner, Jack Gibbs, two of the Bowman boys and John Barnard went to the hay loft of the barn at about five o'clock that same afternoon and made observations as to the location of the body in the barn, the position of the body and its condition, as well as the condition of the loft in the vicinity of the body.

They found the body of deceased lying on his back, diagonally with the head to the southeast and the gun diagonally across the body with the butt between the feet of the deceased. The muzzle was just a little to the left of the position of the heart of the body. The left hand was lying down at his side. The sheriff picked up the gun and ejected an empty shell. The gun had blood stains on it. A little piece of flesh was in the muzzle and fell out when the sheriff tipped the gun up. The trigger hammer was down pressing the firing pin against the shell. There was one empty shell at the right side of the body.

The hay mow was empty with the exception of a few alfalfa leaves on the floor of the barn. The ceiling was bare; a little to the left and over the body was the pattern of a charge of shot that had entered the roof at the juncture of a rafter and a cross member. There was a little piece of denim pinned to the roof by a shot at that point. There were some small particles of flesh and blood with stains there, and from there north for a distance of probably

six feet were pieces of flesh up in the roof and some particles on the cross bar or the binder of the building. At the window just west of the body were small particles of flesh and bloody spots on the sill. This window was about three feet square and about five feet from the base of the window to the floor. Particles of flesh rested on the edge of the sill at the bottom of the window. His feet were in front of that window about 18 inches from the wall. No shots were found in the barn other than the pattern immediately above the body.

The left side of Bowman's face was gone and there was no mouth. The left eye was out of the socket, lying over with the flesh. He wore artificial teeth and his lower plate was broken into pieces in several places and lying with the mangled part of his face, and the upper plate was out lying along the side of the face. There was not much blood on the floor, but part of the face was injured and bloody. The different parts of the face were not distinguishable, being commingled with the flesh and torn parts of the face. The left ear was practically covered with a piece or pieces of flesh lying back over it.

The body was removed to the undertaking parlor where a further examination was made which disclosed that in addition to the above that the left eye was completely out of the socket, lying on the temporal region of the left side; the left ear was split from the lobe up about half way in the ear, and there were about three distinct rents or tears in the flesh of the left cheek which seemed to be more of a fan-like shape. The right jaw bone was broken and protruded through the skin. The head of the deceased was loose to the touch and not solid. The mouth was entirely shot away. The roof of the mouth was in about five different pieces connected only by some so-called connective tissue, with blood or matter of some sort oozing

through these breaks. On the underside of the chin wa a tear about three inches long extending somewhere o the left side sort of diagonally down toward the side o the neck. The flesh remained where the tear was, goin down under part of the chin on both sides; not very muc of the chin was left on the left side. Practically the entir left side of the face was gone. The tears of the chee could not be reconstructed definitely into their origina shape, but could be reshaped only to a point about midwa of the cheek (p. 86). On the left shoulder was a scratch o sear about two inches long extending from about the nippl upward and slightly toward the left shoulder.

At the time of his death, Mr. Bowman was wearin the jumper (Exhibit 3) and the shoes (Exhibit 2) wit rubbers over them, trousers and an ordinary gray wor shirt (p. 63). The jumper had two holes in it to the le of the lapel. (p. 66).

Deceased's family relations had always been good an on the date of the death he was of cheerful dispositio

The sheriff tested the gun by dropping it severa times a distance of one foot to see if it would discharg from impact, but it would not do so. (p. 88.)

It is appellant's contention that the facts, which ar as above set forth, are not sufficient to establish tha the deceased came to his death "from bodily injurie effected solely through external, violent and accidenta means."

ASSIGNMENT OF ERRORS

1. The court erred in denying defendant's motio for nonsuit at the close of the plaintiff's case.

2. The Court erred in denying defendant's motio for a directed verdict at the close of all of the evidenc

3. The Court erred in denying defendant's motion for a new trial.

4. That the verdict of the jury was and is contrary to the evidence.

5. The judgment of court entered herein is contrary to the law.

6. That the evidence was and is insufficient to support a verdict for the plaintiff in excess of $2,500.00 and accrued interest thereon for the reason that there is no evidence that the insured John D. Bowman, came to his death by accidental means.

7. That the verdict of the jury is contrary to the evidence for the reason that taking the evidence as a whole, the physical facts are such that they conclusively establish that John D. Bowman's death resulted from suicide.

8. The court erred in entering judgment against the defendant and in favor of plaintiff for the reason that there is no evidence in the record to support said judgment, and that said judgment is contrary to the evidence and contrary to law and that the evidence does not, as a matter of law, justify a judgment in favor of plaintiff.

SUMMARY OF ARGUMENT

All the errors assigned are to the same effect: That there is no evidence to prove that Bowman's death was accidental.

The burden was on plaintiff to prove by a preponderance of the evidence that the deceased met his death by accident as defined in the contract of insurance, that is; the beneficiary has the burden of proof that the insured's death resulted solely from accidental means within double indemnity meaning of the life policy.

New York Life Insurance Co. vs. Gamer, 303 *U. S. S*
Ct. 161, 82 *L. Ed.* 480.

Frankel vs. New York Life Insurance Co., 51 *Fed.* (2*d*
933, 935.

Supreme Tent K. of M. vs. King, 142 *Fed.* 678.

New York Life Insurance Company vs. Anderson, 6
Fed. (2*d*) 707.

Presumption that a violent death was accidental rathe
than suicidal is not evidence and may not be given weigh
as evidence.

New York Life Insurance Co. vs. Gamer, 303 *U. S. S*
Ct. 161, 82 *L. Ed.* 480, 484.

Despiau vs. United States Casualty Co. (*C. C. A.* 1s
89 *F.* (2*d*) 43, 44.

Jefferson Standard Life Insurance Co. vs. Clemme
(*C. C. A.* 4*th*) 79 *F.* (2*d*) 724, 103 *A. L. R.* 171.

Travelers Insurance Company vs. Wilkes, (*C. C.*
5*th*) 76 *F.* (2*d*) 701, 705.

Fidelity & Casualty Company vs. Driver (*C. C. A.* 5*th*
79 *F.* (2*d*) 713, 714.

Frankel vs. New York Life Insurance Co., (*C. C.*
10*th*) 51 *F.* (2*d*) 933, 935.

Ocean Accident & G. Corp. vs. Schachner, (*C. C.*
7*th*) 70 *F.* (2*d*) 28, 31.

A verdict cannot rest upon mere speculation and co
jecture. Whenever circumstantial evidence is relied up
to prove a fact, the circumstances must be proved and n
themselves presumed. Speculation and conjecture are n
enough, and a verdict that rests upon speculation a
conjecture cannot be allowed to stand.

Pennsylvania Railroad Co. vs. Chamberlain, 77 *L. Ed.* 825; 288 *U. S.* 333.

Chicago, M. & St. P. R. Co. vs. Coogan, 271 *U. S.* 472, 70 *L. Ed.* 1041, 1045; 46 *S. Ct.* 564.

Gulf, M. & N. R. Co. vs. Wells, 275 *U. S.* 455, 459; *L. Ed.* 370, 372; 48 *S. Ct.*, 151.

New York C. R. Co. vs. Ambrose, 280 *U. S.* 486, 74 *Ed.* 562, 50 *S. Ct.*, 198.

Stevens vs. The White City, 285 *U. S.* 195, 76 *L. Ed.* 704, 52 *S. Ct.* 347.

Del Vecchio vs. Bowers, 296 *U. S.* 280; 56 *S. Ct.* 190; *L. Ed.* 229.

New York Life Ins. Co. vs. Anderson, (*C. C. A. 8th*) (2*d*) 705.

Frankel vs. New York Life Insurance Co., (*C. C. A.*) 51 *F.* (2*d*) 933.

New York Life Insurance Co. vs. Alman, (*C. C. A.* 22 *F.* (2*d*) 98.

Burkett vs. New York Life Insurance Co., (*C. C. A.* 56 *F.* (2*d*) 105.

Johnson vs. Industrial Commission, 35 *Ariz.* 19; 274 51.

Hawkins vs. Kronick Cleaning & Laundry Co., 157 *n.* 33; 195 *N. W.* 766.

Chaudiers vs. Sterns & Culver Lumber Co., 173 *N. W.* 201.

It is a matter of common knowledge that persons nit suicide notwithstanding abundant reasons to be fied with their lot in life.

Burkett vs. New York Life Ins. Co., (*C. C. A.* 5) 56 *F.* (2*d*) 105.

New York Life Ins. Co. vs. Trimble, (*C. C. A.* 5) 69 *F.* (2*d*) 849, 851.

Aetna Life Insurance Co. vs. Tooley, (*C. C. A.* 5) 16 *F.* (2*d*) 243, 244.

In the following cases it was held as a matter of w that there was no evidence to support a verdict resting u[p]n accidental death.

Frankel vs. New York Life Insurance Co., 51 (2*d*) [9]3.

Burkett vs. New York Life Insurance Co., 56 *F.* (2[d]) 105.

New York Life Insurance Co. vs. Anderson, 66 *F.* (2[d]) 707.

Fidelity & Casualty Co. of New York vs. Driver [1]9 *F.* (2*d*) 713.

New York Life Insurance Co. vs. Alman, 22 *F.* (2*d*) [8].

Aetna Life Insurance Co. vs. Tooley, 16 *F.* (2*d*) [3].

New York Life Insurance Co. vs. Trimble, 69 *F.* (2[d]) 849.

Sugar vs. Industrial Commission of Utah, 75 *P.* (2[d]) 311.

Aetna Life Insurance Company vs. Alsobrook, 29 *S. W.* 743.

Fidelity Mutual Life Insurance Co. vs. Wilson, 2 *S. W.* (2*d*) 80.

Love vs. New York Life Insurance Co., (*C. C. A.* 1[0]) 65 *F.* (2*d*) 829.

ARGUMENT

In view of the fact that all of the assignments of error nd upon assignment six, we are taking up the argument at first.

> "6. That the evidence was and is insufficient to support a verdict for the plaintiff in excess of $2,500 and accrued interest thereon for the reason that there is no evidence that the insured John D. Bowman came to his death by accidental means."

The burden was upon plaintiff to establish by a preerance of the evidence that the deceased met his death leged. The plaintiff proved no other facts than that sed came to his death from gun shot wound. The n was upon her to prove that the discharge of the was accidental.

The Supreme Court of the United States has set at all doubt upon this question and in a very recent nouncement upon appeal from this court, said:

> "Under the contract in the case now before us, double indemnity is payable only on proof of death by accident as there defined. *The burden was on the plaintiff to allege and by a preponderance of the evidence to prove that fact.* The complaint alleged accident and negatived self-destruction. The answer denied accident and alleges suicide. Plaintiff's negation of self-destruction, taken with defendant's allegation of suicide, served to narrow the possible field of controversy. Only the issue of accidental death vel non remained. The question of fact to be tried was precisely the same as if the plaintiff merely alleged accidental death and the defendant interposed denial without more." (Italics supplied.)

New York Life Ins. Co. vs. Gamer, 303 *U. S. S. Ct.* 1[illegible]; 82 *L. Ed.* 460.

See also:

Frankel vs. New York Life Insurance Co., 51 *F.* (2) 933.

Supreme Tent K. of M. vs. King, 142 *F.* 678.

New York Life Insurance Co. vs. Anderson, 66 *F.* (2) 707.

There were no eye-witnesses to this death. As to how the gun was discharged is not known but the burden was on plaintiff to prove that fact. That the gun may have been accidentally discharged by dropping or in some other manner is of course a possibility, but certainly not a probability in view of no showing that it was or could be so discharged.

> "Verdicts must rest on probabilities, not on mere possibilities."

Love vs. New York Life Insurance Co., 64 *F.* (2*d*) 829, 832.

Samulski vs. Menasha Paper Co., 147 *Wis.* 285, 33 *N. W.* 142, 145.

United States vs. Crume (*C. C. A.*) 54 *F.* (2*d*) 556, 558.

New York Life Insurance Co. vs. Trimble, 69 *F.* (2*d*) 849, 850.

The possibility of an accidental discharge of this gun was left entirely to the imagination of the jury. Plaintiff made no attempt to prove that it was possible for this gun to be discharged other than by pulling the trigger. The theory of accidental discharge was left entirely to speculation and conjecture. And a verdict cannot rest upon

speculation and conjecture. The circumstances must be proved and not presumed.

Pennsylvania Railroad Co. vs. Chamberlain, 77 *L. Ed.* 819, 825; 288 *U. S.* 333.

Chicago, M. & St. P. R. Co. vs. Coogan, 271 *U. S.* 472, 478; 70 *L. Ed.* 1041, 1045; 46 *S. Ct.* 564.

Gulf M. & N. R. Co. vs. Wells, 275, *U. S.* 455, 459; 72 *L. Ed.* 370, 372; 48 *S. Ct.* 151.

New York C. R. Co. vs. Ambrose, 280 *U. S.* 486; 74 *L. Ed.* 562, 50 *S. Ct.* 198.

Stevens vs. The White City, 285 *U. S.* 195; 76 *L. Ed.* 689; 52 *S. Ct.* 347.

Del Vecchio vs. Bowers, 296 *U. S.* 280; 56 *S. Ct.* 190; 80 *L. Ed.* 229.

New York Life Insurance Co. vs. Anderson, 66 *F.* (2*d*) 975.

Frankel vs. New York Life Insurance Co., 51 *F.* (2*d*) 993.

New York Life Insurance Co. vs. Alman, 22 *F.* (2*d*) 98.

Burkett vs. New York Life Insurance Co., 56 *F.* (2*d*) 15.

Johnson vs. Industrial Commission, 35 *Ariz.* 19; 274 *P.* 161.

Hawkins vs. Kronick Cleaning & Laundry Co., 157 *Minn.* 33; 195 *N. W.* 766.

Chaudier vs. Sterns & Culver Lumber Co., 173 *N. W.* 13.

It may be that plaintiff was attempting to rely upon the presumption that a person will not kill himself, as

evidence of accidental death, but if so, the Supreme Court of the United States in the very recent case of *New York Life Insurance Co. vs. Gamer,* (supra) very definitely ruled that out when it held:

> "The presumption is not evidence and may not be given weight as evidence."

New York Life Insurance Co. vs. Gamer (*supra*) 8[illegible] *L. Ed.* 484.

Despiau vs. United States Casualty Co., 89 *F.* (2*d*) 43, 44.

Jefferson Standard Life Insurance Co. vs. Clemmer, 79 *F.* (2*d*) 724, 730; 103 *A. L. R.* 171.

Travelers Insurance Co. vs. Wilkes, 76 *F.* (2*d*) 701, 705.

Fidelity & Casualty Co. vs. Driver, 79 *F.* (2*d*) 713, 71[illegible]

Frankel vs. New York Life Insurance Co., 51 *F.* (2*d*) 933, 935.

Ocean Accident & G. Corp. vs. Schachner, 70 *F.* (2*d*) 2[illegible] 31.

Thus, under these rules, the plaintiff is left with no evidence whatsoever that the deceased's death was the result of accident.

MOTIVE

During trial, plaintiff's counsel argued to some extent that there was a lack of motive for suicide. We are not concerned with motive, as the burden of disproof is upon the plaintiff.

> "It is a matter of common knowledge that persons commit suicide notwithstanding abundant reasons to be satisfied with their lot in life."

Burkett vs. New York Life Insurance Co., 56 *Fed.* (2*d*) 05, 107.

> "Motive is helpful but is not essential. This is so because in this life men who have no apparent motive for it, do commit suicide. Perhaps always in the case of a sane person who commits suicide there is motive, but in many cases the motive is not and could not be proved."

New York Life Insurance Co. vs. Trimble, 69 *F.* (2*d*) 9, 851.

Aetna Life Insurance Co. vs. Tooley, 16 *F.* (2*d*) 243, 4.

Burkett vs. New York Life Insurance Co., 56 *F.* (2*d*) 15.

However, it is our contention that the evidence shows that motive was not lacking: Here is a man who had been stricken with cerebral thrombosis, which in all likelihood would leave him permanently disabled (Tr. 82, 98). Men in that condition have been known to commit suicide much more frequently than men who are in good health and have all their faculties. His actions within three hours of his death were unusual. A crippled man getting a gun and carefully explaining that he was going to shoot birds and putting his grandchildren on the heads (Tr. 44), walking an aggregate distance of two or more miles to get two shells, and going to the extreme effort of pulling himself up into the hay mow with a crippled arm—all this only to shoot sparrows with only two shot gun shells—and then shooting himself with one of them in such a way as to blow his left cheek into shreds, which lay outward, and shooting away his entire mouth, would, we believe, indicate to the normal person that this man had other

motives in his mind than just shooting at sparrows for the welfare of the farm. But even if these circumstances did not exist, it did not relieve plaintiff of the burden of proving the death by accident and this she did not do.

The physical facts in the case clearly indicate that the deceased took his own life, and particularly the fact that his face was blown from the inside outward, (Tr. 85) that a piece of flesh fell from the end of the muzzle of the gun when the sheriff picked it up (Tr. 88) and the further and most significant fact that the gun could not be discharged accidentally, as shown by a thorough test made by the sheriff shortly after the accident (Tr. 88)

In the following cases, evidence was examined by the appellate courts and held to be evidence of suicide and not accident.

Frankel vs. New York Life Insurance Co., 51 *Fed.* (2d) 933.

Burkett vs. New York Life Insurance Co., 56 *F.* (2d) 105.

New York Life Insurance Co. vs. Anderson, 66 *F.* (2d) 707.

Fidelity and Casualty Co. of New York vs. Driver, 7[illegible] *F.* (2d) 713.

New York Life Insurance Co. vs. Alman, 22 *Fed.* (2d 98.

Aetna Life Insurance Co. vs. Tooley, 16 *F.* (2d) 24[illegible]

New York Life Insurance vs. Trimble, 69 *F.* (2d) 84[illegible]

Sugar vs. Industrial Commission of Utah, 75 *P.* (2d) 311.

Aetna Life Insurance Co. vs. Alsobrook, 299 *S. W.* 74[illegible]

Fidelity Mutual Life Insurance Co. vs. Wilson, 2 *S. W.* (2*d*) 80.

Love vs. New York Life Insurance Co., 65 *F.* (2*d*) 829.

But, it was not for defendant to prove suicide; the burden was on plaintiff to prove death by accident.

Taking up the remaining assignments of error, to-wit:

"1. The court erred in denying defendant's motion for nonsuit at the close of the plaintiff's case.

"2. The Court erred in denying defendant's motion for a directed verdict at the close of all of the evidence.

"3. The court erred in denying defendant's motion for a new trial.

"4. That the verdict of the jury was and is contrary to the evidence.

"5. The judgment of the court entered herein is contrary to the law.

"7. That the verdict of the jury is contrary to the evidence for the reason that taking the evidence as a whole, the physical facts are such that they conclusively establish that John D. Bowman's death resulted from suicide.

"8. The court erred in entering judgment against the defendant and in favor of plaintiff for the reason that there is no evidence in the record to support said judgment, and that said judgment is contrary to the evidence and contrary to the law, and that the evidence does not, as a matter of law, justify a judgment in favor of plaintiff."

Appellant adopts the argument of assignment 6 in suppor of its contention that the court erred in these other respects.

CONCLUSION

The burden of proving that the death of the decease was by accident is on the plaintiff. It is submitted tha she failed to meet this burden by any evidence, let alon the preponderance thereof, and that therefore, the refusa of the court to grant defendant's motion for nonsuit, th motion for directed verdict, and motion for new trial wer error prejudicial to defendant; and that the judgmen should be reversed.

Respectfully submitted,

DAN B. SHIELDS,
F. M. BISTLINE,
Attorneys for Appellant